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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH LAMONT KIMBLE, Defendant and Appellant.	B262249 (Los Angeles County Super. Ct. No. BA410832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine K. Mader, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant Kenneth L. Kimble was convicted of attempted robbery, robbery, and sending a false bomb. Defendant contends that trial counsel failed to investigate, to present exculpatory evidence and to object to DNA evidence in violation of his Sixth Amendment right to effective assistance of counsel; that the court abused its discretion by denying defendant's motion to strike his prior convictions; that there is insufficient evidence his prior convictions were for serious felonies; and that he was denied the right to testify at his priors trial. We affirm.

PROCEDURAL BACKGROUND

By information filed August 30, 2013, defendant was charged with attempted second-degree robbery (Pen. Code,[1] § 664/211; count 1), second-degree robbery (§ 211; count 2), kidnapping to commit another crime (§ 209, subd. (b)(1); count 3); and sending a false bomb (§ 148.1, subd. (d); count 4). The information also alleged that 11 prior convictions, all arising out of the same case, constituted strike priors (§ 667, subds. (b)–(i), § 1170.12, subds. (a)–(d)) and serious-felony priors (§ 667, subd. (a)(1)). The trial court dismissed count 3 under section 995. For purposes of the verdict forms only, the court renumbered count 4 as count 3.

Defendant pled not guilty and denied the allegations. The court bifurcated trial on the prior-conviction allegations. Defendant did not testify in the guilt-phase trial. After deliberating for three hours and 30 minutes over two days, the jury convicted defendant of all remaining counts. Defendant waived jury trial on the prior-conviction allegations, and defense counsel moved to strike them under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. After a court trial in which defendant represented himself, the court found the prior convictions true.

After a contested hearing, the court denied defendant's motion to dismiss the prior convictions under *Romero*, and sentenced him to 55 years to life. The court selected count 1 (§ 664/211) as the base term, and sentenced defendant to a third-strike

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[1] All undesignated statutory references are to the Penal Code.

term of 25 years to life. The court imposed a third-strike term of 25 years to life for count 2 (§ 211) and five years for the serious-felony prior (§ 667, subd. (a)), to run consecutive. The court stayed count 4 (§ 148.1, subd. (d)) under section 654.

Defendant filed a timely notice of appeal, and we appointed counsel to represent him. On October 30, 2015, defendant's appellate counsel filed a brief in which she raised no issues and asked us to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Later that day, we notified defendant that his counsel had failed to find any arguable issues and that he had 30 days to submit by brief or letter any arguments he wished this court to consider. Defendant filed a timely supplemental brief.

FACTUAL BACKGROUND

Shakey's Pizza

On January 19, 2012, at approximately 7:10 a.m., Robert Sandoval, a cook, was working at Shakey's Pizza, located at 6052 Olympic Boulevard in Los Angeles. Sandoval had just accepted a food delivery when defendant surprised Sandoval and told him he was being robbed. Defendant was wearing gloves and was holding zip ties and an item that looked like a gun. Sandoval grabbed defendant; a fight ensued, and Sandoval chased defendant outside. Defendant fled without taking any property. Sandoval noticed that the window was broken and saw a rock. He called the restaurant manager.

Officer Oliver Malabuyo responded to the scene and spoke to Sandoval. Sandoval described the suspect as 35 to 40 years old and five feet, nine inches tall. Malabuyo noticed the window overlooking the front entrance of Shakey's Pizza was broken and saw a rock in the front entrance area, on the other side of a wall and under a booth. Malabuyo found zip ties and a spray can nozzle, which looked like a toy gun. Using a single glove, he collected these items and placed them all in the same evidence bag. Three six-minute surveillance videos, taken from different angles, were played for the jury. The videos show the suspect sneaking through the restaurant; Sandoval

discovers him, and a series of struggles and conversations follow before the suspect runs off. The person in the video is not clearly identifiable.

Detective Paul Quan testified that on January 24, 2013, more than a year after the robbery, Sandoval failed to identify defendant in a photo lineup; he circled a different person. However, Sandoval did identify defendant at the preliminary hearing and at trial.

DNA criminalist Heather Simpson screened DNA obtained from the rock, zip ties, and plastic handle. Criminalist Quang Nguyen analyzed the DNA found on the zip ties and the rock, and concluded defendant's DNA matched the DNA obtained from the rock and was consistent with the DNA obtained from the zip ties. Nguyen could not identify a DNA profile on the plastic handle.

The parties stipulated that defendant was born on March 25, 1962, and is 70½ inches tall.

Smart and Final

On March 16, 2012, at approximately 8:45 p.m., Jose Barajas was working as a supervisor at Smart and Final, located at 10113 Venice Boulevard in Los Angeles, when defendant entered the store, approached Barajas, pulled out a gun, and pressed it to Barajas's side.[2] Defendant told Barajas to walk to the office. As they arrived, supervisor Claudia Cardenas walked out. Defendant was holding either a women's purse or a large tote bag. He said the bag contained a bomb, and ordered Barajas to put the bomb on top of the safe; Barajas complied. Defendant demanded the money in the office safe. Barajas and Cardenas gave defendant money from the drawer and the safe. Defendant told them to wait five minutes to let him go, or he would detonate the bomb. Then he took the money and left. Barajas called the police, his manager, and the loss prevention department; he did not wait five minutes.

Bomb technician Anthony Huerstel responded to the scene about 30 minutes later. Huerstel used a robot armed with disruptor canons to deploy the bomb remotely

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[2] Barajas was unable to describe the gun, and did not know whether it was real.

and render it safe. The item did not explode. After collecting and analyzing the debris, Huerstel concluded the item was a false bomb created with everyday items.

Meanwhile, loss-prevention representative Frank Said had also responded to the scene. When employees were allowed to reenter the store several hours after the robbery, Barajas, Cardenas, and Said reviewed portions of the store's surveillance footage; Barajas and Cardenas both identified defendant as the robber. Said provided authorities with three clips of defendant entering and exiting the store. The 13-second video was shown to the jury. The video contains seven seconds of clear footage showing defendant entering the store with a small bag at 8:31 p.m. The video then shows someone wearing the same clothes and carrying the same bag exiting the store 20 minutes later; the exit video contains two seconds of footage from one camera and four seconds of footage from a second camera. Although Smart and Final was equipped with 28 surveillance cameras covering different parts of the store—including the office where the robbery occurred—none of that footage was provided to authorities.

On May 2, 2013, approximately a year after the robbery, Barajas and Cardenas each identified defendant in a photo array. Barajas and Cardenas also identified defendant in court.

DISCUSSION

Defendant contends that trial counsel failed to investigate, to present exculpatory evidence and to object to DNA evidence in violation of his Sixth Amendment right to effective assistance of counsel; that the court abused its discretion by denying defendant's motion to strike his prior convictions; that there is insufficient evidence his prior convictions were for serious felonies; and that he was denied the right to testify at his priors trial. As we discuss below, these contentions are without merit.

1. Ineffective Assistance of Counsel

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." Implicit in this guarantee is the right to be represented by an attorney who meets at least a minimal standard of competence. (*Strickland v. Washington* (1984) 466 U.S. 668, 685–687

[104 S.Ct. 2052] (*Strickland*).) "To establish ineffective assistance, defendant must satisfy two requirements. [Citation.] First, he must show his attorney's conduct was 'outside the wide range of professionally competent assistance.' [Citation.] Then, he must demonstrate the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel's failings, the result of the proceeding would have been different. [Citation.]" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1168.)

"The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " (*Padilla v. Kentucky* (2010) 559 U.S. 356, 366 [130 S.Ct. 1473] quoting *Strickland, supra*, [466 U.S.] at p. 688.) "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland, supra*, at p. 688.)

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland, supra,* 466 U.S. at pp. 690-691.) Accordingly, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." (*Hinton v. Alabama* (2014) __ U.S. __ [134 S.Ct. 1081, 1089].)

"[N]ormally[,] a claim of ineffective assistance of counsel is appropriately raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform the [*Strickland* inquiry]." (*People v. Snow* (2003) 30 Cal.4th 43, 111.) "There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will

consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." (*Massaro v. United States* (2003) 538 U.S. 500, 508 [123 S.Ct. 1690].) In general, however, " '[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) These arguments should instead be raised on collateral review. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

1.1 Failure to Present Exculpatory Evidence

According to defendant, Keon Ray Hall was prepared to testify that he (Hall) robbed the Smart and Final. In light of the exculpatory potential of this evidence, defendant "contends that he was prejudiced by counsel's failure to interview and subpoena Keon Hall as a witness." Because the record reveals the defense **did** interview and subpoena Hall, we treat defendant's argument as a claim that his trial attorney provided ineffective assistance of counsel by failing to supply the court with legal authority to support admission of third-party-culpability evidence—namely, one or more statements by Hall confessing to the March 16, 2012 Smart and Final robbery.

The record reveals the defense team interviewed Hall and subpoenaed him to testify. Hall failed to appear in court, and a bench warrant was issued. "And for an extended period the body attachment has been issued. However, Mr. Hall is nowhere to be found." In light of Hall's absence, defense counsel prepared to call a defense investigator to testify to Hall's statement, which she argued was admissible under Evidence Code section 1230 as a statement against penal interest. Though the prosecutor conceded any statement would be a declaration against penal interest, he argued the court should nevertheless exclude it because the defense had not established the statement's reliability. The court expressed concern about how the jury would evaluate Hall's credibility, but did not deny the defense request. Instead, the court noted, "I just have never seen this done before. I'm open to you showing me a case

where it's been upheld. People show me a case where it's been excluded. And we'll deal with it then." However, it does not appear defense counsel ever provided the court with a legal basis to admit the evidence or made any further efforts to establish the statement's reliability.

In light of defendant's argument and the proceedings below, we requested and received supplemental briefing from defense counsel and from the People on whether trial counsel provided ineffective assistance of counsel by failing to follow up on this issue. Because Hall's recorded statement was not reliable or trustworthy, we find that defendant's trial counsel had sound, tactical reasons for not following up on her prior attempt to present this evidence. Accordingly, defendant has not established that his trial attorney was ineffective for failing to provide the court with a legal basis to admit Hall's statement.

1.2 Alibi Witnesses

Defendant argues that "although appellant told his trial counsel that he was at [a] sports bar named 'Carbon' at the time of the crime, *trial counsel never presented his testimony*, nor did trial counsel present alibi witnesses Chuck Borrea and Jose Esqueda who would corroborate appellant's account, even though they were willing and available to testify. But, trial counsel failed to contact them." (Emphasis added.) Defendant appears to argue that defense counsel provided ineffective assistance in two ways—by failing to call defendant to testify about his alibi and by failing to contact or subpoena Borrea and Esqueda.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." (*Harris v. New York* (1971) 401 U.S. 222, 225.) "The right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process.' " (*Rock v. Arkansas* (1987) 483 U.S. 44, 51–53; see *People v. Barnum* (2003) 29 Cal.4th 1210, 1223 [constitutional right to testify].) Defendant does not argue that he was unaware of his right to testify. To the contrary, defendant's supplemental brief displays a sophisticated understanding of this right. Nor does defendant contend that he waived his right to testify on the advice of defense

counsel or that there was anything improper about the waiver itself. Because we find no violation of defendant's right to testify at trial, his argument that trial counsel "never presented his testimony," is apparently part of a broader claim that counsel failed to investigate or call witnesses who could have substantiated the alibi defense.

Certainly, defense counsel has a duty to investigate possible defenses and to interview potential alibi witnesses. (*Strickland*, *supra*, 466 U.S. at pp. 690–691.) However, the record before us does not disclose what actions, if any, trial counsel undertook to consult Chuck Borrea and Jose Esqueda. Defendant did not ask the court below to appoint new counsel to investigate this claim or to prepare a new trial motion on this basis—nor did he file one himself despite acting in pro per at the priors trial. On appeal, defendant offers nothing except his own assumptions about the witnesses' likely testimony and what trial counsel did or did not do to secure that testimony. Because "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,]" the issue is not cognizable on direct appeal. (*People v. Wilson*, *supra*, 3 Cal.4th at p. 936.)

1.3 Failure to Object to DNA Evidence

While his argument is unclear, defendant appears to contend that the prosecution had an obligation to introduce into evidence the physical rock, plastic handle, and zip ties recovered from Shakey's—and the DNA recovered from those items. Because the physical items were not produced at trial, he argues the criminalist should not have been allowed to testify about the DNA recovered from them, and defense counsel was therefore ineffective for failing to object. Defendant thus appears to contend that the physical items recovered from the Shakey's crime scene were a critical link in the chain of custody for the DNA evidence; without them, there was an insufficient evidentiary foundation for the DNA evidence. Defendant also appears to argue that defense counsel was ineffective for not independently investigating the items recovered from Shakey's and the DNA evidence retrieved from those items. We disagree.

The authenticity of physical evidence must be established by the proponent of the evidence. In a criminal case, the prosecution must prove that the identity and integrity

of the physical evidence was maintained throughout the process of collection, analysis, and reporting. (See *Baker v. Gourley* (2000) 81 Cal.App.4th 1167, 1173–1174, citing Cal. Code of Regs, title 17, § 1219 [collection of blood and alcohol samples].) That is, a continuous chain of custody is a necessary prerequisite to the admission of physical evidence. To permit testimony regarding an expert's analysis of physical evidence, the prosecution must show the evidence found at the scene of the crime is the same physical evidence that was gathered by law enforcement officers and that it was analyzed without alteration. (*People v. Jimenez* (2008) 165 Cal.App.4th 75, 79–82 [DNA reference sample inadmissible because chain of custody was inadequate regarding labeling, sealing, and segregation from other samples having no connection to case].)
A sufficient chain of custody foundation is established if the prosecutor can show it is reasonably certain there was no alteration of the original evidence. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) Here, our review of the record indicates the prosecution properly accounted for the chain of custody of each of the disputed items.

To the extent defendant argues the prosecution team had an obligation to introduce the biological samples themselves at trial, he has presented us with no authority to support that contention—and our research has revealed none. To the contrary, there are sound evidentiary and health reasons not to bring biological samples to court, admit them into evidence, or store them with the rest of the trial evidence in the courthouse. (See § 1417.9, subd. (a) [storage of biological material]; Couzens & Bigelow, Sex Crimes: California Law and Procedure (The Rutter Group 2015) § 12:16 ["The best procedure is not to allow the evidence in court, or, if it is admitted, have it returned to the proponent. There rarely is a need to admit the actual serological evidence in a court proceeding. Envelopes or vials containing notations regarding chain of custody can be photocopied for use during the trial. It is a rare court that has the physical facilities to safely store these items during the trial, much less the long-term storage required while a case is on appeal."].)

Nor does the record before us disclose what actions, if any, trial counsel undertook to investigate the DNA evidence. Because "the record on appeal sheds no

light on why counsel acted or failed to act in the manner challenged[,]" the issue is not cognizable on direct appeal. (*People v. Wilson, supra*, 3 Cal.4th at p. 936.)

2. The court did not abuse its discretion in denying defendant's *Romero* motion.

On November 17, 2014, defense counsel asked the court to dismiss defendant's prior strike convictions in the interest of justice. (§ 1385; *Romero, supra*,13 Cal.4th 497.) The court denied the motion. Defendant contends the court abused its discretion by failing to strike his prior convictions because his "criminal history does not include any actual violence and [his] prior convictions all arose from a single period of aberrant behavior[.]" We find no abuse of discretion.

Sentencing courts have the discretion to strike a criminal defendant's strike priors when doing so would be in the interest of justice. (§ 1385; *Romero, supra*, 13 Cal.4th at pp. 504, 530–531.) If, after considering a defendant's background, the nature of his present offense, and the objectives of rational sentencing, it would be in the interest of justice to dismiss a strike prior, the court should do so. (*Ibid*.; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978–980.) In exercising its discretion, the trial court must consider and weigh all relevant factors. (*In re Saldana* (1997) 57 Cal.App.4th 620, 626.) In particular, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strike law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

We review the court's ruling on a *Romero* motion under the "deferential abuse of discretion" standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) We must determine "whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*Williams, supra*, 17 Cal.4th at p. 162.) " 'The burden is on the party attacking the sentence to clearly show that the sentencing

decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citation.]' " (*Alvarez*, *supra*, 14 Cal.4th at pp. 977–978.) "Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, at p. 377.)

Since, by their nature, all Three Strikes cases involve recidivist defendants with serious criminal records, the California Supreme Court has cautioned trial courts not to over-emphasize defendants' past crimes. (*People v. Garcia* (1999) 20 Cal.4th 490, 501-502.) Thus, while a defendant's prior convictions are undoubtedly relevant to a *Romero* ruling, courts should not view a defendant's criminal record in isolation. (*Alvarez*, *supra*, 14 Cal.4th at p. 981 [Considering only a defendant's criminal history is "incompatible with the very nature of sentencing discretion; the entire picture must remain exposed."].)

Here, in addition to defendant's criminal history, the court properly considered other factors. For example, the court noted that when he was arrested in this case, defendant was 53 years old, had remained violation-free for a decade, and had become a productive member of society. The court explained, "I have to say that I've thought about your situation a lot, unlike other people who are facing three strikes, because of this interim period of time where you demonstrated that you could be a force for good in the community or in the K-9 community."

However, the court also properly considered the nature and circumstances of the current offenses in denying the *Romero* motion. (See *Williams*, *supra*, 17 Cal.4th at p. 161.) A nonviolent current offense may justify a court's dismissal of a defendant's prior strikes; conversely, if the current crime is violent, the court may properly deny the motion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 308–310.) For example, in

People v. Myers, the appellate court upheld the trial court's decision not to dismiss a defendant's prior convictions for arson and armed robbery after defendant was convicted of being a felon in possession of a firearm. The trial court reasoned that the prior crimes were violent and the current crime posed a threat of violence. (*Id.* at p. 305.) In this case, the court properly emphasized the violent nature of defendant's current offenses in denying the motion:

"And then I thought to myself, you know, if it was one incident rather than two, if you hadn't gone to the trouble to make that fake bomb that the customers thought or the employees thought was a real bomb, if you hadn't had a gun that the employees thought was a real gun, maybe I would think of things differently. [¶] But obviously[,] a lot of planning went into these crimes. You thought about how you could make a bomb. You thought about what—you could make something that would be enough to threaten or terrorize people. You were able to have the presence of mind not necessarily in the Shakey's place but in the other location to actually lead people, employees, into the back office where there was a safe and where you held what they thought was a weapon on them when you had them open the safe. And they were scared to death. I still remember them testifying. These were very violent crimes. [¶] So you know, when I think about both that there are two situations, that there [are] weapons involved, that there is planning and sophistication involved and I can't trust that you won't do it again, I have to come to the conclusion that you are an appropriate candidate for third strikes, three strikes sentencing."

In light of its consideration of a variety of appropriate factors, we cannot conclude the court's *Romero* ruling " 'falls outside the bounds of reason[.]' " (*Williams*, *supra*, 17 Cal.4th at p. 162.)

3. There is sufficient evidence that the prior convictions are serious felonies.

Defendant contends the evidence is insufficient to support the court's findings that his prior convictions are serious felonies under the Three Strikes law because the prosecution did not prove that he personally used a firearm when he committed the

crimes. Defendant is correct that the original and amended abstracts of judgment in the prior case conflict on this point.[3] However, because assault with a firearm is always a serious felony under the current version of the Three Strikes law, the conflict is immaterial. (§ 1192.7, subd. (c)(31); *People v. Delgado* (2008) 43 Cal.4th 1059, 1067, fn. 3 (*Delgado*) ["all assaults with deadly weapons are serious felonies"].)[4] This issue is a question of law, which we review de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893–894.)

Serious felonies are listed in section 1192.7, subdivision (c). A prior conviction for a listed felony may be alleged in a subsequent prosecution as both a serious-felony prior (§ 667, subds. (a)(1), (a)(4) [five-year enhancement for serious-felony priors brought and tried separately where new conviction is also a serious felony]) and a strike prior (§ 667, subd. (d)(1); § 1170.12, subd. (b)(1)). Before voters enacted Proposition 21 in 2000, assault with a firearm in violation of section 245, subdivision (a)(2) ("section 245(a)(2)") was a serious felony only if the defendant *personally* used a firearm in the commission of the offense. (former § 1192.7, subds. (c)(8), (c)(23) [as amended by Stats.1999, ch. 298 (A.B.381), § 1]; *Delgado*, *supra*, 43 Cal.4th at pp. 1066–1067 & fn. 3; *People v. Rodriguez* (1998) 17 Cal.4th 253, 261–262.) Thus, proof that a defendant had a prior felony conviction under section 245(a)(2) was not enough to prove that he had been convicted of a serious

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[3] The normal appellate record in a criminal case must contain "[a]ny document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term[.]" (Cal. Rules of Ct., rule 8.320(b)(13)(C); see § 969b.) The record in this third-strike appeal does not contain the section 969b documents used to prove defendant's prior strikes, and appellate counsel did not move to correct or augment the record to add them. (See Cal. Rules of Ct., rules 8.155(b), 8.340(b); Local R. 2(a).) In light of the seriousness of this case and the importance of this portion of the record, we have requested and reviewed People's exhibits 12 and 13. (Cal. Rules of Ct., rules 8.224(d), 8.320(e).)

[4] Defendant does not dispute that he was convicted of a serious felony, robbery, in the current proceeding (§ 1192.7, subd. (c)(19)), or that the current conviction is an eligible third strike under Proposition 36 (§ 667, subd. (e)(2)(C)).

felony. The conviction could only be used as a strike prior if the People proved *both* that the defendant committed the crime *and* that he committed it while personally armed. (*Delgado* at fn. 3; *People v. Rodriguez* at pp. 261–262.) Defendant correctly notes that while the original abstract of judgment in his prior case indicates he was convicted of 10 counts of section 245(a)(2), it does not indicate that he committed the assaults while personally armed. And although the amended abstract of judgment indicates that the jury found a personal-use allegation (§ 12022.5, subd. (a)) true for each count, defendant argues we have no way of knowing which abstract of judgment is correct.

We need not resolve the apparent conflict, however, because under the current version of section 1192.7, assault with a firearm is always a serious felony; defendant need not be personally armed when he commits it. (§ 1192.7, subd. (c)(31) ["serious felony" includes "assault with a . . . firearm, . . . in violation of Section 245"].)[5] Though only the amended abstract reflects the personally-armed enhancements, both abstracts of judgment reflect that defendant was convicted of 10 counts of assault with a firearm under section 245(a)(2). We therefore conclude the evidence is sufficient to support the court's determination that the prior convictions are serious felonies under the Three Strikes law (§ 667, subd. (d)(1); § 1170.12, subd. (b)(1)).

4. Defendant was not denied the right to testify at the priors trial.

Finally, defendant contends he was denied due process of law because the court "refused to allow [him] to testify to explain documents attributed to him." Because defendant presents a mixed question of law and fact implicating an important constitutional right, we review his claim de novo. (*People v. Cromer*, *supra*, 24 Cal.4th at pp. 893–903.)

The United States Supreme Court has held that "under recidivist statutes where an habitual criminal issue is 'a distinct issue' [citation] . . . [d]ue process . . . requires [the defendant] be present with counsel, have an opportunity to be heard, be confronted

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[5] Defendant was sentenced under the current version of the statute.

with witnesses against him, have the right to cross-examine, and to offer evidence of his own." (*Specht v. Patterson* (1967) 386 U.S. 605, 610 [87 S.Ct. 1209]; accord, *Camillo v. Armontrout* (8th Cir. 1991) 938 F.2d 879, 881 ["When enhanced punishment depends upon evidence of prior criminal convictions, defendants have a right to procedural due process," including confrontation of witnesses].) However, the extent to which a criminal defendant's right to be heard includes the right to testify at a priors trial remains unclear. (*Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911, 918–919 [right to be heard includes the right to testify, citing *Rock v. Arkansas*, *supra*, 483 U.S. at p. 49]; but see *People v. Marin* (2015) 240 Cal.App.4th 1344, 1364 [under *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276], trial court may determine statutory elements of the prior offense using " 'the documents . . . approved in [*Taylor v. United States* (1990) 495 U.S. 575 and *Shepard v. United States* (2005) 544 U.S. 13]—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement' " but may not engage in additional judicial factfinding].)

In this case, defendant waived his right to a jury trial and represented himself in the bifurcated portion of the proceedings. After extensive legal argument about whether his prior convictions were serious felonies, defendant asserted his right to testify. The court asked: "What would you like to say other than something you've already said? And it has to go to whether the prior convictions involve you and whether or not they are true. That's all that's relevant." Defendant took the stand, objected to the admission of the conflicting abstracts of judgment, and concluded, "that's basically it." The court then asked, "Is there anything else that you want to testify to?" Defendant replied, "No."

Defendant now "asserts that had he been able to testify, he could have explained and established that he did not personally [use] a firearm." However, as discussed above, because assault with a firearm is always a serious felony (§ 1192.7, subd. (c)(31)), defendant's personal use or non-use of a firearm had no bearing on the issue before the court. The facts underlying the prior convictions were therefore irrelevant. Since only relevant evidence is admissible (Evid. Code, § 351), a defendant

has no constitutional right to testify about irrelevant matters. (See, e.g., *U.S. v. Scheffer* (1998) 523 U.S. 303, 308 [118 S.Ct. 1262] (plurality opn.) [referring to criminal defendant's "right to present relevant evidence"]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 821–822 [court's right to exclude defendant's cumulative testimony].) Because defendant's proposed testimony was irrelevant to the issues below, we need not decide whether the due process clause might require admission of such testimony in other circumstances. (Compare *Gill v. Ayers*, *supra*, 342 F.3d at pp. 917–921 & fn. 7 [defendant has due process right to testify at a recidivist hearing about facts relevant to whether the offenses were strikes where personal use was not previously presented] with *People v. Bartow* (1996) 46 Cal.App.4th 1573, 1576–1581 [court properly denied defendant's request to testify about the truth of the prior-conviction allegations because neither side may call live witnesses at a priors trial].) Thus, the court properly limited defendant's testimony to "whether the prior convictions involve [him] and whether or not they are true."

DISPOSITION

We have examined the entire record, and are satisfied appellate counsel has fully complied with her responsibilities and no arguable issues exist in the appeal before us. (*Smith v. Robbins* (2000) 528 U.S. 259, 278–284; *Wende*, *supra*, 25 Cal.3d at p. 443.) The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

HOGUE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.